

Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
KOOTENAI RIVER BASIN (76D)
PRELIMINARY DECREE

* * * * *

CLAIMANTS: Lisa M. Byington; Stephen R. Byington

CASE 76D-0231-R-2023

76D 128976-00

76D 30130301

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Statement of the case

Mining claim 76D 128976-00 received the following issue remark:

POINT OF DIVERSION WAS MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

Domestic claim 76D 30130301 received the following issue remarks:

NO MEANS OF DIVERSION WAS CLAIMED.

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 76D DECREE ISSUED 03/22/1984.

FILING FEE INSUFFICIENT TO COVER CLAIM. TOTAL AMOUNT DUE \$130.00.

THE CLAIMED FLOW RATE EXCEEDS THE 35 GPM GUIDELINE FOR THIS PURPOSE AND CANNOT BE CONFIRMED DUE TO LACK OF DATA.

CLAIM FILED LATE 7/2/2019.

THE CLAIMED PERIOD OF USE MAY BE QUESTIONABLE. USE OF THIS WATER MAY NOT BE FEASIBLE DURING WINTER MONTHS.

THE CLAIMED PLACE OF USE DOES NOT APPEAR TO BE USED FOR DOMESTIC IRRIGATION PURPOSES.

THE TYPE OF HISTORICAL RIGHT AND PRIORITY DATE MAY BE QUESTIONABLE. DOCUMENTATION TO SUPPORT THE TYPE OF HISTORICAL RIGHT AND PRIORITY DATE WAS NOT SUBMITTED WITH THIS CLAIM.

NO PRIORITY DATE WAS CLAIMED.

THE CLAIMED PURPOSE (USE) CANNOT BE CONFIRMED DUE TO LACK OF DATA.

THE TYPE OF HISTORICAL RIGHT MAY BE QUESTIONABLE. DOCUMENTATION SUBMITTED WITH THE CLAIM INDICATES A FILED RIGHT.

VOLUME MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.

THE CLAIMED VOLUME MAY BE EXCESSIVE. THE CLAIMED NUMBER OF HOUSEHOLDS AND ACRES OF DOMESTIC IRRIGATION APPEAR TO BE INACCURATE.

Issue remarks result from Department of Natural Resources and Conservation ("DNRC") claims examination. Claims examination confirms the historical use of water right claims and identifies issues with claims. If claims examination cannot confirm some aspect of a claim, an issue remark is added to the claim. Montana law requires the Water Court to resolve issue remarks.

Stephen R. Byington filed late objections to each claim. The late objections were rejected by the court, but the court placed the information included with the late objections in each claim file to assist with issue remark resolution. No elements appeared on the objection list for mining claim 76D 128976-00. Accordingly, Mr. Byington's filing is deemed a motion to amend water right claim 76D 128976-00.

The issue remarks appearing on domestic claim 76D 30130301 put the validity of the claim at issue. Upon review, the claim failed to meet the definition of an exempt claim eligible for filing between 2013 and 2019. Byingtons were provided the opportunity to file evidence refuting this Master's review of the record concerning domestic claim 76D 30130301. Byingtons did not file any new evidence, instead filing the same evidence included with the late objection in the claim file.

Issues

1. Should the place of use, point of diversion, and means of diversion for claim 76D 128976-00 be amended to accurately reflect historical use?
2. Should the source name for claim 76D 128976-00 be corrected?
3. Is the notice issue remark appearing on claim 76D 128976-00 resolved?
4. Is domestic claim 76D 30130301 an exempt right pursuant to Section 85-2-222, MCA?
5. Should domestic claim 76D 30130301 be dismissed from the adjudication?

Findings of fact

1. A preponderance of evidence establishes that the place of use, point of diversion, and means of diversion for claim 76D 128976-00 should be amended as proposed by Byingtons to accurately reflect historical use.
2. The clerical error in the source name for claim 76D 128976-00 should be corrected. The source should be Snowshoe Creek.
3. Domestic claim 76D 30130301 does not meet the definition of an exempt right pursuant to Section 85-2-222, MCA.
4. Domestic claim 76D 30130301 should be dismissed from the adjudication.

Principles of law

1. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. Section 85-2-227, MCA. Prima facie proof may be overcome by other evidence that proves, by a preponderance of the evidence, that an element of the prima facie claim is incorrect. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R. A preponderance of the evidence is a “modest standard” and is evidence that demonstrates the fact to be proved is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 348, 240 P.3d 628.

2. The Montana Water Court is permitted to use information submitted by the Department of Natural Resources and Conservation, the statement of claim, information from approved compacts, and any other data obtained by the Court to evaluate water right claims. Section 85-2-231(2), MCA.

3. When resolving issue remarks, the Montana Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA.

4. The Montana Water Court has the authority to resolve issue remarks when the claim file and information available to the Court provide a sufficient basis to do so. Section 85-2-248(3), MCA.

5. Notice by publication of an amendment is required if there is the possibility of adverse affect to other water users. Section 85-2-233(6), MCA.

6. Rule 15, M.R.Civ.P., restricts the scope of an amendment to the conduct, transaction, or occurrence set forth in the original pleading - the “same set of operative facts as contained in the original pleading.” *Sooy v. Petrolane Steel Gas, Inc.*, 218 Mont. 418, 422-423, 708 P.2d 1014, 1017 (1985). The requested amendment “merely makes more specific that which has already been alleged.” *Prentice Lumber Company v. Hukill*, 161 Mont. 8, 15, 504 P.2d 277, 281 (1972).

7. The party seeking to amend a water right claim has the burden to show, by a preponderance of the evidence, that the claim elements they challenge do not accurately reflect the beneficial use of the water rights as they existed prior to July 1, 1973. *Nelson v. Brooks*, 2014 MT 120, ¶34, 375 Mont. 86, 329 P.3d 558; Rule 19, W.R.Adj.R.

8. A clerical mistake or mistake arising from omission or oversight may be corrected by the court at any time. Rule 60(a), M.R.Civ.P.

9. “‘Existing right’ or ‘existing water right’ means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973.” Section 85-2-102(13), MCA

10. Exempt rights are existing rights for stock or domestic use of groundwater or instream flow. Section 85-2-222(1), MCA.

Analysis

Issues 1, 2 and 3 – claim 76D 128976-00 amendments, clerical correction, and issue remark resolution

Byingtons’ extensive evidence supporting the proposed amendments to place of use, point of diversion, and means of diversion for mining claim 76D 128976-00 included photographs of the Montana Department of Environmental Quality placards at the mining site, mine plats describing and illustrating a 2,000-foot long iron pipeline diverting water from a dam located at Lower Snowshoe Lake to the mining mill, a topographic map, and aerial photo. (See claim file.) Additionally, prima facie statement of claim 76D 128976-00 supports Byingtons’ amendments. The statement of claim:

- identifies Lower Snowshoe Lake as the source,
- includes a map identifying the pipeline from the lower reservoir (Lower Snowshoe Lake) in the NESENE of Section 12, Township 28 North, Range 31 West, Lincoln County to the mining mill in Section 7, Township 28 North, Range 31 West, Lincoln County, and
- states the place of use includes the “Snowshoe Mine, Rustler Mine, Porcupine Mine, & Chinook Mine.” Portions of both the Rustler and Chinook Mines are in the more general and amended place of use legal land description, the NENW of Section 7, Township 28 North, Range 31 West, Lincoln County.

The amendments to the point of diversion and place of use identified by claim 76D 128976-00 do not have the ability to adversely affect other water users. No other water users have points of diversion or places of use between the claimed and amended legal

land descriptions. The amended means of diversion refines the information identified by the claim. No public notice of the amendments is necessary.

The source should be corrected from Showshoe Creek to Snowshoe Creek.

The point of diversion issue remark on mining claim 76D 128976-00 instructed claimants and other water users that if no objections were filed to the modification, the point of diversion would remain as it appears on the Preliminary Decree abstract.

Byingtons filed a motion to amend the point of diversion. The motion to amend point of diversion resolves the point of diversion issue remark.

Conclusions of law

Based upon DNRC's claim examination material, the statement of claim, and Byingtons' evidence, the proposed amendments to claim 76D 128976-00 are historically accurate and overcome by a preponderance of evidence the prima facie proof afforded the statement of claim, justify the amendments to the claim, and resolve the point of diversion issue remark on the claim.

Clerical errors may be corrected at any time. The requested correction to the source for mining claim 76D 128976-00 should be completed.

Issues 4 and 5 – claim 76D 30130301 exempt claim status, dismissal of claim

In 2013 and 2017, the Montana Legislature amended § 85-2-222, MCA, and provided for the filing of exempt claims subject to specified terms and conditions. Exempt claims are existing rights for stock or domestic use of groundwater or instream flow. Section 85-2-222(1), MCA.

There is no information on the statement of claim form or its attachments indicating the water right historically diverted water directly from the source (no diversion or conveyance system) or groundwater. Byington's additional evidence states **"Means of Diversion: Dam and pipeline** Supportive Information: The Rustler Mine Plat (see **Appendix C**) describes and illustrates a 2000-foot iron "pipeline" up to a "reservoir dam" that diverted water for the mining operation and the domestic/garden." (See January 15, 2022 letter, p. 2, re-filed a second time on January 26, 2023.) All evidence confirms that domestic claim 76D 30130301 historically diverted water using

Service via USPS Mail

Lisa M. Byington
Stephen R. Byington
463 Swede Gulch Dr
Libby, MT 59923

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
KOOTENAI RIVER
BASIN 76D**

Water Right Number: 76D 128976-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: STEPHEN R BYINGTON
463 SWEDE GULCH DR
LIBBY, MT 59923

LISA M BYINGTON
463 SWEDE GULCH DR
LIBBY, MT 59923

Priority Date: DECEMBER 31, 1896

Type of Historical Right: FILED

Purpose (use): MINING

Flow Rate: 1.70 CFS

Volume: 616.91 AC-FT

THE USE OF THIS WATER APPEARS TO BE LARGELY NONCONSUMPTIVE.

Source Name: SNOWSHOE CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NESENE	12	28N	31W	LINCOLN

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

DAM IS LOCATED ON LOWER SNOWSHOE LAKE.

PIPELINE IS A SECONDARY MEANS OF DIVERSION.

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NWNWNE	7	28N	31W	LINCOLN
2			NENW	7	28N	31W	LINCOLN
3			W2SWSE	6	28N	31W	LINCOLN
4			E2SESW	6	28N	31W	LINCOLN

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
KOOTENAI RIVER
BASIN 76D**

Water Right Number: 76D 30130301 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: DISMISSED

Owners: STEPHEN R BYINGTON
463 SWEDE GULCH DR
LIBBY, MT 59923

LISA M BYINGTON
463 SWEDE GULCH DR
LIBBY, MT 59923

Priority Date:

Type of Historical Right:

Purpose (use): DOMESTIC

Flow Rate:

Volume:

Source Name: UNNAMED TRIBUTARY OF SNOWSHOE CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.